Supreme Court, U.S.
FILED

(1)

03 139 JUL 15 2003

[redacted]

In the

Supreme Court of the United States

LILLIAN HERNANDEZ,

Petitioner,

v.

BOROUGH OF PALISADES PARK
POLICE DEPARTMENT
AND BOROUGH OF PALISADES PARK

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

LEE NUWESRA
Counsel of Record
LEE NUWESRA, LLC
44 Wet 125th Street
Suite 3F
New York, NY 10027
(212) 828-7888
Attorneys for
Petitioner

CURRY & TAYLOR ♦ (202) 393-4141 ♦ HTTP://USSCINFO.COM

36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a municipality can be held liable under § 1983, for a series of constitutional violations committed by officials who are not Policy-makers per se.

2. Whether a municipality can be held liable under the deliberate indifference standard, if Policy-makers ignored obvious constitutional misconduct.

3. Whether under the facts and circumstances of this case municipal liability should attach to the Borough of Palisades, under policy, custom and/or deliberate indifference to Hernandez's constitutional rights.

Including the parties named in the caption of this petition, the parties are:

Petitioner: Lillian Hernandez, an individual.

Respondents: Borough of Palisades Park is a Municipal Corporation, established by New Jersey Law.

Borough of Palisades Police Department is a Law Enforcement Agency established by the Borough of Palisades Park.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 17

APPENDIX

Circuit Court Opinion 1a

Order Denying Rehearing 13a

District Court Rehearing 14a

TABLE OF AUTHORITIES

Blair v. City of Pomona,
223 F. 3d 1074 (9th Cir. 2000) 14

Billings v. Madison Metropolitan School Dist.
259 F.3d 807 (7th Cir. 2001) 12

Brewster v. Shasta County,
275 F.3d 803 (9th Cir 2001) 12

Carter v. Harris,
164 F.3d 215 (4th Cir. 1999) 14

Cozzo v. Tangipahoa Parish Council,
262 F.3d 501 (5th Cir. 2001) 12

Olsen v. Layton Hills Tenths Mall,
312 F.3d 1304 (10th Cir. 2002) 12

Cuesta v. School Bd. of Miami,
285 F.3d 962 (11th Cir. 2002) 12

Monnel v. Department of Social Services,
436 US 658 (1978) 13

Randall v. Prince George's County,
302 F.3d 188 (4th Cir. 2002) 12

Rookard v. Health and Hospital's Corp.
710 F.2d41 (2d Cir. 1983) 1

STATUTES

Federal Rule of Civil Procedure 56 (c) 3

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

42 U.S.C. § 1983 ..... 2, 12

IN THE
SUPREME COURT OF THE UNITES STATES

LILLIAN HERNANDEZ

Petitioner,

V.

BOROUGH OF PALISADES PARK POLICE, DEPARTMENT AND BOROUGH OF PALISADES PARK

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LILLIAN HERNANDEZ, Petitioner, by the undersigned counsel, under the appropriate rules of this court, respectfully requests that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) is not reported. The opinion and order of the United States District Court for District of New Jersey (Pet. App. 3a) is not reported.

JURISDICTION

Original jurisdiction in the U.S. District Court for New Jersey was based upon 28 U.S.C. § 1331, 1343, and 42 U.S.C. § 1983.

The judgment of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) was entered on January 29, 2003. The Third Circuit denied a timely petition for rehearing on March 27, 2003 (Pet. App.2a). This Court has jurisdiction under 28 U.S.C. § 1254 (1). This Honorable Court granted a motion for extension of time to submit this petition, to July 15, 2003.

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment to the United States Constitution provides that: The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of their life or limb; nor shall be compelled in

any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process law."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 United States Code 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

Federal Rule of Civil Procedure 56 (c)

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories and admissions on the file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

A. *General Background and Description.*

Ms. Lillian Hernandez, who is a Hispanic Female lived in the Borough of Palisades Park, New Jersey, from 1987 to 1997. On or about 2-12-1993, Ms. Hernandez pursuant to the Borough's Police Department Policy and/or Practice, notified Police Officer Anderson that she would be away for a few days, and asked him to keep an eye on her home. At the time, the Borough of Palisades Police Department had a policy and practice of encouraging its citizenry to advise the Department when they are away. The purpose of this policy was to afford residents who are away, the extra protection of having police officers keep extra vigilance in safeguarding their property.

The Borough of Palisades Park and the Borough of Palisades Park Police Department are a municipal corporation and a law enforcement agency, respectively. Both entities are charged with the duty of insuring the safety of their citizens and protection of the property thereof. Between 1991 and 1995, the Police Department consisted of seventeen officers. Policies and edicts were set for by the Borough Officials, the Chief of Police and his Designees, whose responsibilities were to guarantee that the police personnel/officers had adequate supervision, training and safeguards to prevent abuse and misuse of the officers knowledge and power.

B. *Ms. Hernandez's Home Was Burglarized By Members Of The Borough's Police Department.*

On February 15, 1993, upon Ms. Hernandez's return from her brief vacation, she discovered that her house had been burglarized and Nine (9) fur coats were

stolen, valued at about $50,000. Both P.O. Anderson and his Commanding Officer, Lt. Giannantonio investigated the crime scene, and Lt. Giannantonio submitted an investigation report. In August 1997, Ms. Hernandez was advised by the FBI that Anderson and Giannantonio were responsible for the burglary at issue, amongst others.

C. *The Police Department Entity's Custom Through The Edicts And Acts Of Its Officials, Injured Ms. Hernandez And Violated Her And Other Citizens' Constitutional Rights.*

During the years 1991 through 1995, at least five of the seventeen members of the Police-force, or about 30%, while using their police status and authority conspired to deprive minority individuals and minority owned businesses of their property without due process of law, while acting under the color of law. These officers included: Lt. John Giannantonio, Sgt. Edward Shirley, Sgt. Brian Maurer, Officer Scott Maresco, and Patrolman Michael Anderson. Eventually, these individuals were convicted of acting under the color of law while using their police status to conspire and commit burglaries and steal property from various residences and business establishments and for depriving individuals and businesses of their property without due process of law.

Former Police Officer Anderson testified that if a police officer wanted something he could have it as long as he kept his mouth shut. Both he and Sgt. Shirley also testified that it was common knowledge around the police department that police officers were committing similar crimes for years. Specifically, Lt. Giannantonio was once investigated by the State Police for theft, and that the Borough Police department suspected that Lt. Giannantonio was responsible for other similar crimes.

There was a pervasive mind-set in force that allowed officers to go unchecked while committing violations, in return for their acquiescence and silence when observing crimes of other fellow-officers.

Before the thefts were committed against Ms. Hernandez, numerous other crimes were committed and covered up by officers of the Police Department. For instance, on May 6, 1992, Anderson radioed Police HQ that he heard an alarm at a grocery store. Under the guise of checking the premises, he inspected the premises. He determined that a security system was in use and a safe was contained on the premises. On July 1, 1992, Anderson and former Sgt. Shirley stole the safe with a large sum of cash. While on official duty investigating the burglary, Lt. Giannantonio spoke with a witness that provided a description of the burglars that closely resembled Anderson and Shirley. Giannantonio filed a false report to protect and deflect attention from his co-conspirators.

On November 16, 1992, a residence was burglarized and currency was stolen by P.O. Anderson and another. Information of what to find and where to find it was given to him by Sgt. Shirley. Moreover, during the burglary, Sgt. Shirley patrolled the area to serve as a watch guard. Most of these violations, if not all, were committed against minority residences and businesses. In 1990, less than 25% of the Borough of Palisades Park's residents were minority, yet more than 60% of the burglaries by the Police agents were committed against minorities.

Moreover, at the relevant time, Chief of Police Lustman, Captain Framarin, the head of the Detective Bureau for the Police Department as well as Lt. Servis knew or were suspicious that Officer Anderson was or

could have been involved in committing the unlawful acts of burglarizing citizen's homes and/or businesses. In 1992, a Security Alarm Company reported to the Police Department that there was strong indication that a Police Officer had committed a break-in and stole from a local business. Furthermore, Officer Anderson testified that Ms. Hernendez's former husband, unknown to her at the time, had indicated his suspicions of Officer Anderson's involvement in the burglary and theft of her fur coats in 1993, and reported it to the Police Department. Yet, nothing was done to rectify the problem and the law enforcement agents were allowed to continue violating the Borough's minority citizen's rights, including that of Ms. Hernandez for a second time, ten days later.

Both former Officers Shirley and Anderson testified that Sergeant Ruh had knowledge of the criminal activities of the Police officers involved. These circumstances did not equate to isolated crimes, rather they equate to custom and practice of crimes committed by the State Actors over the years.

D. *The Police Department's Widespread Practice, Through The Series Of Violations Against Ms. Hernandez And Other Residents Of The Borough Were Deliberately Indifferent To Their Constitutional Deprivations.*

As a senior ranking officer, Lt. Giannantonio, in his capacity as Commanding Officer served at times as the Chief in charge of the entire Department. In this capacity, according to Anderson's testimony, he trained and encouraged his fellow officers to serve as co-conspirators in committing crimes. He also acted as a mentor in the criminal activities to Police Officer

Anderson, Sergeant Shirley, as well as other Officers in the Department.

It was the policy and custom of the Police Department that the highest-ranking officer on the scene would supervise and take charge to insure that a proper and accurate report is obtained so that information is communicated up and down the chain of command. In addition, it was the policy and custom of the Police Department that every report should be reviewed. The report is then placed in a bin for examination by all police officers so that any police officer can provide comments and aid in the investigation of the crime. The report is then submitted to a higher-ranking officer and ultimately to the Chief of Police for his review. Furthermore, it was the policy and custom of the Police Department that when the report is reviewed, a notation of the person who examined it would be marked on every report.

Anderson testified to numerous crimes that he and his fellow Police Officers were able to commit because of the customs and practices of the police-force in training and supervising its personnel in committing Hernandez's burglary and other similar crimes. He as well as others received training from Lt. Giannantonio who taught them how to lie on their reports, how to use their positions as police officers to scout out potential targets in the guise of investigating a break-in, how to make sure that a fellow Police Officer is patrolling the area so that if they set off an alarm, the fellow officer would be the one called to the crime scene enabling him to cover up for them. They were further instructed to carry their badges with them when burglarizing, so that if anybody became suspicious they could just flash their badges. Anderson testified that they had altered crime scenes and lied on reports to

cover-up crimes committed by members of the police force. Lt. Giannantonio coordinated the timing of the crimes with his shift of official duty and then provided to his co-conspirators training and instructions on how to avoid detection.

E. *The Municipality And Its Chief Of Police Failed To Supervise Or Train Its Police Department Members.*

The Borough and Police Chief failed to supervise their police force resulting in numerous thefts occurring in the minority communities of Palisades Park. As a result of the reckless indifference of the Borough's and Chief's actions or inactions, Ms. Hernandez was forced to move out of the Palisades Park Community due to concerns for her safety and her young son's well-being.

Their inaction encouraged the theft and cover up perpetrated by members of its police force. The very institution that was responsible for upholding the law, and protecting its citizens. According to the Borough and Police departments written policies and procedures, the Police Chief, was/is required to set policies and procedures for the police department. However, by custom and practice, during the time at issue, the police chief delegated his authority to his high ranking officers, allowing them to implement his policies and acquiesced to practices set to enforce his policies. Lt. Giannantonio, served as a commanding officer. As such, he was required to direct and control personnel under his command to insure the proper performance of their duties and adherence to established rules, regulations, policies and procedures.

In addition, although responsible for insuring adherence to policies, the Police Chief failed in his duty

to monitor, inspect and guarantee, that the implementation of the policies, through customs set by high ranking officers, adequately insured the Police-force knowledge and compliance with these policies. Police Chief Genovese testified that each Police Officer was required to learn police operations and policies from their supervisors and fellow officers and were given a manual that each officer was required to know and maintain. However, the Chief did not follow through to make sure that every police officer periodically reviewed the manual or even received one. At the relevant time, the Officers training mainly constituted of an on the job training and mentoring.

Moreover, Chief Genovese testified that it was the policy of the police department that when a complaint was filed against a police officer it would go to the internal-affairs officer who would lock it up in a filing cabinet. The Chief further testified that access to the complaints were restricted. In fact, the Chief himself had limited access to the files, and could not identify which officers had complaints against them. Furthermore, Chief Genovese, testified that for the period in question, Deputy Chief Thorpe was the officer in charge of Internal Affairs. This is of significance because Anderson testified that Deputy Chief Thorpe was not just acquiescent to officers committing crimes, but actually participated in facilitating criminal activity.

In Hernandez's case, the Police Department did not follow its own policy and custom and did not review the report because the report contained no notation that it had ever been reviewed. Both Anderson and Shirley testified that Lt. Giannantonio would assist them and others in altering crime scenes and submitting false and inaccurate reports to cover up their crimes. In the matter at hand, Giannantonio omitted from his report

that Ms. Hernandez had informed Officer Anderson that she would be away on vacation, and that there were many footprints in the snow left at the crime scene, by the burglars. In fact, Anderson testified that Lt. Giannantonio deliberately omitted any reference to him or to the snow because many of the footprints belonged to Officer Anderson himself, linking him to the burglary. It was evident that the Police Department acted contrary to its own policies and customs and to the law of the State by not following its own procedures in investigating criminal action and in ensuring that its policies were in fact enforced.

REASONS FOR GRANTING THE WRIT

This case presents a short and well defined record of important questions of federal constitutional law that have not been clearly settled, and therefore, should be by this Honorable Court. The question is whether actual knowledge by the municipality or policy maker is always necessary to hold it liable for a series of unconstitutional acts or culpable conduct of its lower level officials.

I. THE THIRD CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH OTHER CIRCUIT RULINGS THAT ADDRESSED THE SAME ISSUES DEALING WITH MUNICIPAL LIABILITY AS THEY RELATE TO WHAT CONSTITUTE POLICIES OR CUSTOMS OF LOCAL GOVERNMENT UNITS AS WELL AS DELIBERATE INDIFFERENCE TO A CITIZEN'S CONSTITUTIONAL RIGHTS

The decision below is in direct conflict with the Second Circuit Decision in Rookard v. Health and Hospital's Corp. 710 F.2d 41 (2d Cir. 1983); the Fourth Circuit Decision in Randall v. Prince George's County, 302 F.3d 188 (4th Cir. 2002); the Fifth Circuit Decision in Cozzo v. Tangipahoa Parish Council, 262 F.3d 501 (5th Cir. 2001); the Seventh Circuit Decision of Billings v. Madison Metropolitan School Dist., 259 F.3d 807 (7th Cir. 2001); the Ninth Circuit Decision of Brewster v. Shasta County, 275 F.3d 803 (9th Cir 2001); the Tenth Circuit Decision of Olsen v. Layton Hills Tenths Mall, 312 F.3d 1304 (10th Cir. 2002); and the Eleventh Circuit Decision of Cuesta v. School Bd. of Miami, 285 F.3d 962 (11th Cir. 2002). These Circuits have reviewed what constitutes policy or custom in relations to municipal liability pursuant to 42 U.S.C § 1983, under United States Supreme Court rulings. The lower court in Hernandez held that a municipality will not be held liable if the unconstitutional conduct was committed by Officers other than the Policy-makers.

The Second Circuit in Rookard, a case involving wrongful discharge from employment, explained that where an official has final authority over discretion, the choices he/she makes represent government policy.

The court said that a single unlawful discharge, if ordered by a person whose edicts or acts may fairly be said to represent official policy, may support a § 1983 action against a municipal corporation. An official has final authority if his decisions, at the time they are made, for practical or legal reasons, constitute the municipality's final decisions.

The Fourth Circuit in Randall, held that if a Police Force develops an unconstitutional custom or usage, i.e., a widespread practice of a particular unconstitutional method, such custom or usage may be the basis for muncipal liability under § 1983.

The Fifth Circuit in Cozzo, asserted that for purposes of imposing § 1983 liability on a municipality for deprivation of rights pursuant to official policy, an "official policy" is a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the government entity or by an official to whom the entity has delegated policy-making authority, or a persistent, widespread practice of officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents the entity's policy.

The Sixth Circuit in Burkhart, stated that the Supreme Court in Monell v. Department of Social Services, 436 U.S. 658 (1988), did not condition liability on the source of the policy, but held tht the execution of a government injurious policy, whether made by its law makers or by those whose edicts or acts may fairly be said to present official policy, gives rise to municipal liability under § 1983.

The Seventh Circuit in Billings, said, to establish that a municipality has violated an individual's civil rights under § 1983, a plaintiff must show one of the following: (1) that a municipality had an express policy which, when enforced, caused constitutional deprivation, (2) that a municipality had widespread practice which, although not authorized by written law or express municipal policy, was so permanent and well-settled as to constitute a custom or usage within the force of law, or (3) that plaintiff's constitutional injury was caused by a person with final policy-making authority.

The Ninth Circuit in Brewster, found that a county is subject to liability under § 1983, if its policies established by the county's law makers, or by those whose edicts or acts may fairly be said to represent official policy, caused the constitutional violation at issue.

The Tenth Circuit in Camfield, announced that an unconstitutional policy or custom need not be formal or written to create municipal liability under § 1983. The municipality may be held liable when the illegal practice is so permanent and well settled as to constitute a custom or usage with the force of law.

The Eleventh Circuit in Cuesta, declared that a local government body is liable under § 1983 when execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.

The lower court is also in direct conflict with the Fourth Circuit Decision in Carter v. Harris, 164 F.3d 215 (4th Cir. 1999); and the Ninth Circuit Decision in Blair v. City of Pomona, 223 F. 3d 1074 (9th Cir. 2000), as to the

issue of what constitutes deliberate indifference to a citizen's constitutional rights.

The Fourth Circuit in Carter, held that supervisory and municipal liability attaches where citizens face a pervasive an unreasonable risk of harm from some specified source and the supervisor's corrective inaction amounts to deliberate indifference or tacit authorization of the officers' practices. In other words, a municipality is liable under § 1983 for deliberate indifference, when it condones the improper behavior in the part of its officers.

The Ninth Circuit in Blair, found supervisory and municipal liability, when an agency's actions or failure to act is a result of a custom, practice or policy of inadequate training that equate to deliberate indifference to the affected individual's constitutional rights. The Ninth Circuit held that in those circumstances, a reasonable fact finder could infer that the series of acts were inflicted by the Police Department members with knowledge and tacit connivance of those running the agency.

Fairness in applying uniformity in the standard of analyzing questions of Federal law is essential and required to maintaining trust in the justice system. The different interpretations between the Circuits as to what constitutes municipal customs, policies and deliberate indifference is more than an academic concern. The variety of interpretation has and continues to result in different results involving cases with similar facts. The Hernandez case is illustrative.

Had Ms. Hernandez's case been heard in Second, Fourth, Sixth, Seventh, Ninth or Tenth Circuits, her claims against the municipality would have proceeded

to trial. A reasonable jury considering the totality of the evidence, and resolving all factual disputes in favor of Ms. Hernandez, could conclude that if adequate and proper policies were followed, the Borough and Chief would have prevented the offenses against her. A reasonable jury could also conclude that the criminal activity dated even further back than the FBI's investigation uncovered, which should have been prevented if the Police Department and Borough had adequate policies in place.

Had the Borough or the Police Department insured the supervision of its officers, and/or followed the proper protocols many of the violations would have been avoided, including the burglaries committed against Ms. Hernandez on 2-14-1993 and 2-23-1993. This is corroborated by the testimony of Anderson, who stated that because of the FBI's investigation, and subsequent training, current members of the police force are more aware, better trained and have since adopted the policy that they would no longer be acquiescent to fellow officers committing crimes. Anderson testified that an officer had asked another officer to take a bribe in return for not prosecuting the DWI offense. However, after the new training the officer refused to take the bribe and reported his fellow officer to authorities. The conflict is clear and irreconcilable. Accordingly, Certiorari is appropriate and required in this matter.

CONCLUSION

THEREFORE, Petitioner Lillian Hernandez respectfully requests of this Court that it Grants her Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPECTFULLY SUBMITTED,

LEE NUWESRA
LEE NUWESRA, LLC
Counsel of Record
44 Wet 125th Street, Suite 3F
New York, New York 10027
(212) 828-7888

(Any footnotes trail the end of each document)

No. 02-2210

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LILLIAN HERNANDEZ,
Appellant

v.

BOROUGH OF PALISADES PARK POLICE DEPARTMENT; BOROUGH OF PALISADES PARK

January 13, 2003, Submitted Under Third Circuit L.A.R. 34.1(a)

January 29, 2003, Opinion Filed

COUNSEL: Lillian Hernandez, Pro se, Jericho, NY.

For Lillian Hernandez, Appellant: Lee Nuwesra, New York, NY.

For Palisades Park Police, Borough of Palisades Park, Appellee: Garry J. Furnari, Nutley, NJ. James F. Fine, Law Offices of James F. Fine, Newark, NJ.

JUDGES: Before: SCIRICA, BARRY and SMITH, Circuit Judges.

OPINIONBY: D. Brooks Smith

OPINION: OPINION OF THE COURT

SMITH, Circuit Judge:

Lillian Hernandez appeals the District Court's grant of summary judgment to defendants. Because we agree that appellant failed to introduce evidence of a municipal policy or custom that caused the constitutional violations, we will affirm.

I. FACTS

Appellant Lillian Hernandez is a Hispanic female who lived in the Borough of Palisades Park ("Borough"). The Borough of Palisades Park Police Department had a policy of encouraging citizens to advise the department when they would be away from home. On February 12, 1993, Ms. Hernandez informed Police Officer Michael Anderson that she would be away from home for a few days and asked him to keep an eye on her residence. Anderson promised that he would do so. But rather than fulfill his duty to protect Ms. Hernandez's property, Anderson, with the approval of Lt. John Giannantonio, used this opportunity to rob Hernandez's home. The robbery was part of an ongoing string of robberies which were committed by five Borough police officers beginning in 1992. n1

On February 15, 1993, Ms. Hernandez returned from her vacation to find that nine of her fur coats had been stolen. There was another attempted burglary of Ms. Hernandez's residence on February 23, 1993, although nothing was stolen on that occasion.

In 1994, the Police Department began investigating police corruption and turned over its findings to the Bergen County Prosecutor's Office. This investigation resulted in the indictment of Anderson and the four other police officers in 1997. Anderson eventually pleaded guilty.

II. PROCEDURAL POSTURE

Appellant filed a complaint against the Borough and its Police Department under 42 U.S.C. § 1983 for violation of her rights pursuant to the First Amendment (violation of privacy), Fourth Amendment (illegal search and seizure), Fifth Amendment (taking) and Fourteenth Amendment (violation of due process and equal protection because the robberies allegedly were committed disproportionately against minority citizens). She alleged that the Police Department and Borough had a custom of committing these robberies and negligently trained and supervised the rogue officers. The District Court granted summary judgment on behalf of the defendants.

III. JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over the appeal based on 28 U.S.C. § 1291.

IV. STANDARD OF REVIEW

This Court exercises plenary review over a district court's order granting summary judgment. See Reitz v. County of Bucks, 125 F.3d 139, 143 (3d Cir. 1997). Summary judgment must be granted if "there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of fact exists "only if a reasonable jury, considering the evidence presented, could find for the non-moving party." Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). Although the moving party must initially point out the absence of evidence necessary to

the non-moving party's case, once it has done so, the burden shifts to the non-moving party to provide evidence to support each element of the party's claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The court must consider all evidence in the light most favorable to the non-moving party. See Marzano v. Computer Sci., 91 F.3d 497, 502 (3d. Cir. 1996); White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). Nonetheless, the evidence produced by the plaintiff must be more than a "mere scintilla. " Anderson, 477 U.S. at 249.

V. LEGAL ANALYSIS

Appellant alleges that the District Court erred in granting summary judgment to both defendants because: 1) it required appellant to provide evidence supporting every element of her case; 2) it resolved material issues of fact by concluding that the pattern of robberies could not in itself put the policymaker on notice of the constitutional violations; and 3) it failed to recognize that a municipality can be liable for failure to train its employees and failure to adequately supervise in order to prevent corruption. n2

First, as the District Court recognized, police departments cannot be sued alongside municipalities because a police department is merely an administrative arm of the municipality itself. See Bonenberger v. Plymouth Township, 132 F.3d 20, 25 n.4 (3d Cir. 1997); Colburn v. Upper Darby Township, 838 F.2d 663, 671 n. 7 (3d Cir. 1988). Therefore, the District Court properly granted summary judgment as to the Borough of Palisades Park Police Department.

Second, contrary to appellant's assertions, it is proper for a district court to grant summary judgment when a

plaintiff fails to produce any evidence on a necessary element of her claim. See Celotex, 477 U.S. at 323-25. Appellant need not try her case by carrying the burden of persuasion, but she must, at a minimum, produce evidence on every element of her claim.

Third, the District Court did not resolve any material issue of fact, nor did it reject the possibility that a municipality may be liable for its policies or customs. Rather, the District Court appropriately concluded that although specific police officers did commit constitutional violations, appellant introduced no evidence suggesting that the Borough had an official policy or custom of committing such violations.

The Borough may be liable for the constitutional violations of its police officers only to the extent that the injuries arose from its policies or customs. See, e.g., Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 694-5, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1295-6 (3d Cir. 1997); Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996). The mere fact that Borough employees committed the burglaries is insufficient because municipalities cannot be held liable in a Section 1983 suit under the doctrine of respondeat superior. See id.

A policy may be made only when a policymaker issues an official proclamation or decision. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (citations omitted). A "policy-maker" is an individual with final and unreviewable authority to make a decision. See Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) (plurality op.); Beck, 89 F.3d at 971; Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990). Appellant argues that because Lt. Giannantonio probably served as

the Commanding Officer at some point during his career, and the Commanding Officer is the officer in charge, Giannantonio's participation in the robbery scheme transformed that scheme into Borough policy. However, as the District Court recognized, appellant introduced no evidence to suggest that Giannantonio was the Commanding Officer at the time the robberies were taking place, or that the Commanding Officer had final authority to set municipal policy. Accordingly, even viewing the evidence in the light most favorable to appellant, she has not produced sufficient evidence to establish a Borough policy.

A custom may exist where the relevant practice is so permanent and "widespread as to have the force of law." Bryan County Commissioners v. Brown, 520 U.S. 397, 404, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997). To show custom, the plaintiff may adduce evidence that a policy-maker (1) had notice that a constitutional violation was likely to occur, and (2) acted with deliberate indifference to the risk. See Berg v. County of Allegheny, 219 F.3d 261, 276 (3d Cir. n.14 (3d Cir. 1989). Generally, notice is established through a pattern of known prior constitutional violations. See Brown, 520 U.S. at 409-10; Berg, 219 F.3d at 276; Beck, 89 F.3d at 973 (holding that pattern of written complaints of violence against an officer sufficient for reasonable jury to conclude policymaker knew or should have known of violations); Bielevicz, 915 F.2d at 851 (policymakers must be aware of similar unlawful conduct in the past but fail to take action to prevent future violations). In rare instances, however, a constitutional violation may be such a "known and obvious" or "highly predictable consequence" of an ongoing course of action that knowledge of past violations is unnecessary. Berg, 219 F.3d at 276 (holding that municipality had notice and was deliberately indifferent to the risk of

unconstitutional arrests from erroneously issued warrants even though no mistakes had been made in the past); cf. City of Canton v. Harris, 489 U.S. 378, 390, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989) (city liable when "in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need") (emphasis added).

In this case, both New Jersey statutes and the Borough's own Police Manual establish that the Chief of Police was the relevant policymaker. See N.J. Stat. Ann. § 40A:14-118 (where position of Chief of Police is established, this position "shall be the head of the police force and ... shall be directly responsible to the appropriate [municipal governing] authority for the efficiency and routine day-to-day operations thereof"); Police Manual 5:1.1-1.2, 6.1, 6.1.4 (noting that Chief of Police is highest ranking officer, that "command shall be exercised by the virtue of rank" and that the Chief shall have "complete authority over all police personnel functions and operations" and shall "set[] the administrative policies of the department"). Although it is clear that there was a series of robberies by police officers in years prior to 1993, the year the Hernandez burglary took place, the District Court concluded that the robberies were not municipal custom because appellant introduced no evidence suggesting that the Chief of Police knew or should have known that his officers were robbing citizens.

Appellant first argues that the existence of a widespread pattern of prior robberies was enough for a reasonable fact-finder to conclude that the policymaker should have known about the constitutional violations. A reasonable

fact-finder may conclude that a Police Chief has constructive knowledge of constitutional violations where they are repeatedly reported in writing to the Police Department. See Beck, 89 F.3d at 973 (the existence of repeated written citizen complaints about abuse of force by a police officer would be enough to support a conclusion that the policymaker knew or should have known of the violations). In addition, "constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of [their] official responsibilities the [municipal policymakers] should have known of them." Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989) (quoting Spell v. McDaniel, 824 F.2d 1380, 1387 (4th Cir. 1987)). Unlike Beck, where written complaints clearly alleged that a police officer was acting unconstitutionally, or Bordanaro, where officers made no attempt to hide the fact that they would regularly break doors down without warrants, the mere existence of past robberies in the Borough is insufficient to establish that the Police Chief had constructive knowledge that the robberies were being committed by police officers.

Appellant next points to several pieces of evidence that the District Court did not consider which she argues support the existence of an unconstitutional custom. She notes that in 1992, an alarm company orally suggested to Lt. Giannantonio that a police officer may have committed the burglary of a restaurant. However, this is insufficient for a reasonable jury to conclude that a policymaker knew or should have known about the constitutional violations. It was a single incident, it was conveyed orally, and Giannantonio promised Anderson that he would not tell anyone else about it. There is also no evidence that this information ever reached the Police Chief. Appellant also observes that her husband

told an officer that he thought Anderson was responsible for the burglary of appellant's home. But since this happened after the burglary had taken place, it cannot demonstrate prior knowledge and deliberate indifference by the Police Chief. See Beers-Capitol v. Whetzel, 256 F.3d 120, 137 (3d Cir. 2001) (requiring plaintiff in a § 1983 action to demonstrate "that the defendant knew of the risk to the plaintiff before the plaintiff's injury occurred").

Appellant also argues that in 1992 there were rumors circulating within the Police Department that Anderson and Sgt. Edward Shirley were committing burglaries. There is no evidence, however, that the Police Chief heard these rumors. As we observed in Johnson v. Elk Lake School District, 283 F.3d 138, 144 n. 1 (3d Cir. 2002), until the rumors are brought to the attention of a policymaker, they cannot constitute evidence that a policymaker knew or should have known of the violations. Cf. also Beers-Capitol, 256 F.3d at 140 (Section 1983 claims against individual employees for 8th Amendment violation based on sexual abuse of youth inmates).

In Johnson, this Court declared that summary judgment was properly granted to the defendant school district on plaintiff's Section 1983 claim for sexual abuse by a school counselor because

Johnson presented no evidence that [the rumors] were ever brought to the attention of a supervisory or policymaking official. Moreover even if school officials had been made aware of these stories . . . we share the District Court's reluctance "to impose on the district an obligation to treat as true, all rumors, until proven otherwise." In the absence of any direct complaints made to school officials, the mere floating around of

unsubstantiated rumors regarding a particular employee-particularly in the high school setting which is notoriously rife with adolescent gossip - does not constitute the kind of notice for which a school district can be held liable.

283 F.3d at 144 n.1. Similarly, in Beers-Capitol, this court affirmed the grant of summary judgment for a supervisor, despite the fact that he had heard rumors of sexual abuse among the inmates at the youth detention facility, because "there [was] no evidence that [the supervisor] believed these allegations were likely to be true or that the evidence surrounding the allegations was so strong that he must have believed them likely to be true." 256 F.3d at 140.

Appellant's case is slightly stronger than Johnson or Beers-Capitol because a police station does not have the same potential for unsubstantiated gossip as a high school or youth detention center, and the requirement in Beers-Capitol that the individual must subjectively believe the rumor only applies in the context of Eighth Amendment violations. See Farmer v. Brennan, 511 U.S. 825, 834, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994) (requiring subjective knowledge by prison official to make out an Eighth Amendment violation). Nonetheless, while it might be proper to attribute to a policymaker constructive knowledge of repeated written citizen complaints, rumors are too insubstantial to deserve similar treatment. As in Johnson, the existence of rumors cannot be enough to infer knowledge on the part of the Police Chief in the absence of any evidence that those rumors were brought to his attention. Therefore, even viewing this evidence in the light most favorable to the appellant, it is insufficient for a reasonable jury to conclude that the Police Chief knew or should have known that his officers were committing constitutional

violations by robbing citizens. Accordingly, the Police Chief's failure to investigate these rumors in 1992 and take action against the offending officers did not constitute deliberate indifference to a known risk of constitutional violations.

Neither can appellant prevail on her theory that the Borough had a custom of deliberate indifference through failure to train or inadequate supervision. Appellant analogizes to Berg, 219 F.3d 261, and Powpow v. City of Margate, 476 F. Supp. 1237 (D. N.J. 1979), to suggest that this is an instance where a violation of a constitutional right is so likely to result from a failure to train or supervise, especially in light of the high degree of nepotism within the Department, that it rises to the level of deliberate indifference. Berg involved the issuance of warrants by typing a number into a computer database, and the court recognized that because merely typing one digit incorrectly would result in the issuance of a warrant for the wrong individual, the potential for constitutional violations was obvious. Here, it was hardly obvious that police officers, sworn to uphold the law, would burglarize the homes of the very citizens whom they were duty-bound to protect because they lacked training that instructed them that such activity was unlawful.

Powpow, upon which appellant also relies, is also inapposite. It involved the death of an innocent bystander based on the police officer's reckless use of his weapon. Based on the high risk that individuals might be injured by improper use of weapons, the District Court held that there was an obvious constitutional risk arising from failing to sufficiently train officers in the use of service weapons in residential areas. Here, there is nothing to suggest that there is an inherently high risk that police officers will commit

robberies absent ethics training. Thus, the failure to train police officers that they should not commit burglaries, or the failure to supervise them to ensure that they do not commit such felonies, is not so likely to result in a violation of a constitutional right as to demonstrate deliberate indifference by Borough policymakers.

VI. CONCLUSION

The order of the District Court should be affirmed.

D. Brooks Smith
Circuit Judge

FOOTNOTES

n1 The Police Department had only 17 police officers, so that approximately 30 of all the officers were involved in the burglary ring.

n2 Appellant also urges us to address whether her complaint was filed in a timely manner, despite the fact that this issue was not reached by the District Court. We decline this invitation. See Virgin Island Conservation Soc., Inc. v. Virgin Island Bd. of Land Use Appeals, 881 F.2d 28, 36 (3d Cir. 1989) (refusing to engage in substantive review of issues not addressed by district court).

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02-2210

LILLIAN HERNANDEZ,
Appellant

v.

BOROUGH OF PALISADES PARK POLICE DEPARTMENT; BOROUGH OF PALISADES PARK

D.C. 99-CIV-4182

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and SMITH, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available *circuit* judges of the circuit in regular active service, an.d no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel, and the Court en banc, is denied.

BY THE COURT:

Circuit Judge
Dated: March 27, 2003